Supreme Court, U.S.
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No. 04-1566

In The Supreme Court of the United States

THEIS RESEARCH, INC.,

Petitioner,

v.

BROWN & BAIN and such Present and Former Brown & Bain Partners, Associates, and other Personnel Responsible for the Management and Trial of all Litigation Involving Peter F. Theis and Theis Research, Inc.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE

On July 1, 2004, Brown & Bain P.A. changed its name to Perkins Coie Brown & Bain P.A. Perkins Coie Brown & Bain P.A. is an Arizona professional corporation and a partner of Perkins Coie LLP. It has no parent corporation, and no publicly-held corporation owns 10 percent or more of its stock.

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I. STATEMENT OF THE CASE

In October 1992, TRI retained Brown & Bain to represent it in patent litigation with Octel Corporation. *See* App. at 33a. In September 1994, a jury trial in the United States District Court for the Northern District of California resulted in a verdict adverse to TRI. *See id.* at 36a.

Blaming its litigation defeat on alleged mistakes by Brown & Bain, TRI invoked a provision in the parties' legal services agreement, under which the parties agreed to submit all disputes to binding arbitration. *See id.* Pursuant to that agreement, TRI served a demand for arbitration on Brown & Bain in January 1996. *See id.* In November 1998, the parties jointly selected an arbitrator. *See id.* Discovery followed, in the course of which Brown & Bain produced to TRI complete documentation of its representation of PacTel Cellular Inc. of Arizona, including its conflict checks, internal memoranda, and the conflict waiver executed by the general counsel of PacTel Cellular Corporation. *See id.* at 40a.

TRI did not attempt to withdraw from the arbitration, but instead submitted its conflicts claims to the arbitrator. After extensive briefing, an evidentiary hearing, and submission by the parties of proposed findings of fact and conclusions of law, the arbitrator filed a decision in April 1999, ruling against TRI on each and every one of the claims asserted in its demand for arbitration. *See id.* at 36a; ER 13 at 6. With specific regard to TRI's allegations of conflict of interest, the arbitrator ruled: "There was no credible evidence that B&B violated any duty it owed to TRI with regard to conflicts of interest." *See* ER 13 at 11.

Dissatisfied with the arbitrator's decision, TRI filed this lawsuit in July 1999. In a pleading captioned "Complaint for Breach of Professional and Fiduciary Duty, Legal Malpractice, and Fraud: Application and Notice of Motion to Vacate Arbitration Award," TRI sought compensatory damages of $200 million plus "exemplary and punitive damages." *See* App. at 6a. Among other things, TRI argued that the zero-dollar arbitration award should be disregarded and its malpractice claims should be retried because TRI was not aware of supposed conflicts of interest that would have voided the parties' legal services agreement and its arbitration clause. Brown & Bain countered by moving to confirm the arbitration award. In August 2001, the district court granted Brown & Bain's motion, finding that TRI knew the relevant facts regarding the alleged conflict of interest and waived any objection to arbitration by electing to proceed in front of the arbitrator:

> Although TRI apparently claims that it was unaware of Brown's alleged conflict of interest until after the arbitration had ended, TRI clearly knew about it by November 20, 1998, four months before the arbitration when it named Pacific Telesis Group as one of Brown's conflicts in response to Brown's interrogatory. . . .
>
> Thus, TRI had ample opportunity before arbitration to seek to withdraw its election to arbitrate or present the conflict issue to the arbitrator or the court. TRI, however, did not do so and instead proceeded with the arbitration. Therefore, TRI waived any claim that it was not contractually obligated to arbitrate any disputes with Brown or that the arbitration was a nullity.

Id. at 39a-40a.

In August 2002, the district court denied TRI's motions for reconsideration and summary judgment and granted Brown & Bain's cross-motion for summary judgment, again concluding that TRI could not re-raise in the district court issues that it chose to submit to arbitration:

> [P]laintiff raised the issue of Brown & Bain's alleged disabling and undisclosed conflict of interest in the arbitration proceedings . . . Therefore, TRI is barred from asserting those claims in litigation and defendant is entitled to summary judgment.

Id. at 31a.

The court of appeals affirmed in an opinion filed October 20, 2004, and amended February 18, 2005. *See id.* at 2a-15a. In affirming, the court of appeals relied on the district court's finding of fact that TRI voluntarily and knowingly submitted to the arbitrator the issue of Brown & Bain's alleged conflicts of interest:

> [TRI] submitted to the arbitrator the issue whether B&B's alleged conflicts of interest rendered the [TRI]-B&B legal services agreement void *ab initio*. The arbitrator rendered a decision on this issue adverse to [TRI]. The district court thus did not err when it determined that [TRI] was barred from relitigating the same issue as part of its federal court malpractice claims. *Ficek v. S. Pac. Co.*, 338 F.2d 655, 657 (9th Cir. 1964) (claimant may not voluntarily submit his claim to arbitration, await the outcome, and if the decision is unfavorable, challenge the authority of the arbitrator to act).

Id. at 13a.

Once again trying to challenge the jurisdiction of a forum in which it lost, TRI also contested federal jurisdiction over its complaint. The court of appeals rejected that argument as well, holding that federal jurisdiction was proper because the parties were diverse and the $200 million in damages sought by TRI's district court complaint easily satisfied the amount-in-controversy requirement. *See id.* at 10a.

II. REASONS FOR DENYING THE WRIT

TRI's petition for a writ of certiorari should be denied because it is premised on misstatements of fact and law. Not one of the questions identified by TRI as presented was actually decided by the court of appeals, and the decision of the court of appeals was both correct and not in conflict with the decision of any other court.

A. The First And Second Questions Identified By TRI Were Not Decided By The Court Of Appeals

TRI seeks certiorari on the ground that the decision of the court of appeals has created conflicts among the circuits on two questions: (i) "whether courts – as opposed to arbitrators – shall decide challenges to an underlying agreement with an arbitration clause on the ground that the agreement was void and never existed at the outset" and (ii) "whether, in a diversity case, state law can render an unlawful underlying agreement, including an arbitration clause and a resulting arbitration award, null and void *ab initio*." Pet at i. In fact, neither question was decided by either the district court or the court of appeals.

TRI contends, as it did in both the district court and the court of appeals, that the arbitrator's award should have been vacated because its agreement to arbitrate was rendered void *ab initio* by Brown & Bain's alleged conflicts of interest. *See* Pet. at 11-13. As it did in both the district court and the court of appeals, TRI premises this contention on the factual ground that it did not learn of Brown & Bain's alleged conflicts, and hence could not raise them, until after the arbitration had concluded. *See* Pet. at 7-9. This crucial factual predicate is inconsistent with the facts found by the district court and relied on by the court of appeals. The district court specifically found that TRI knew of the facts underlying the alleged conflict by November 1998, well before the arbitration took place, yet chose to proceed with the arbitration. App. at 39a-40a. The court of appeals affirmed that finding and agreed that TRI was not entitled to take another bite at the apple in federal court. App. at 13a. There is no reason or basis for this Court to revisit the lower courts' case-specific fact finding.

TRI simply ignores the fatal factual problem with its argument and mischaracterizes the holding of the court of appeals. The court of appeals never held, as TRI charges (Pet. at 3) that "even for admittedly meritorious claims of unlawful conflicts of interest, private arbitrators should have the final say in deciding the legality of underlying agreements, even when they undermine the judicial process." Rather than holding anything even resembling that proposition, the court of appeals simply affirmed that TRI waived any right to judicial resolution of the conflicts issue by knowingly and voluntarily submitting the issue to arbitration.

B. Even If The Court Of Appeals Had Reached The First And Second Questions Identified By TRI, Its Decision Could Not Present Any Review-Worthy Conflict

Because the court of appeals did not decide the questions TRI claims are presented, its decision could not have created any conflict among the circuits regarding them. But even if it had, no conflict worthy of this Court's review could have arisen for the simple reason that this diversity case was decided under the law of California. *See, e.g.*, Pet. at 11. The decision of the court of appeals applying California law could not meaningfully conflict with the decision of any other court of appeals applying federal law or the law of another state. The laws of the various states may permissibly differ one from another and, on these issues, from federal law. The decision of the court of appeals does not conflict with any decision of the California Supreme Court, much less any California Supreme Court decision applying *federal* law.[1] *See* Sup. Ct. R. 10(a).

C. The Third Question Identified By TRI Was Not Decided, And The Decision Of The Court Of Appeals Does Not Conflict With That Of Any Other Court

The decision of the court of appeals that the amount in controversy exceeded $75,000 and that the district court

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[1] TRI's contention that "California authorities hold uniformly that unlawfulness may be raised at any time, including raising unlawfulness for the first time on a motion to vacate, or in opposition to a motion to confirm" (Pet. at 26) is simply wrong. *See, e.g., Loving & Evans v. Blick*, 33 Cal. 2d 603, 604-05 (1949); *South Bay Radiology Medical Associates v. Asher*, 220 Cal. App. 3d 1074, 1078 (1997); *Lindenstadt v. Staff Builders*, 55 Cal. App. 4th 882, 886 (1997); *Alternative Systems, Inc. v. Carey*, 67 Cal. App. 4th 1034, 1040 (1998).

accordingly had diversity jurisdiction does not conflict with that of any other court.

TRI's complaint was unusual in that it did not simply seek to vacate the zero-dollar arbitration award. Instead, the complaint expressly sought compensatory damages of $200 million. *See* App. at 6a. This critical fact was the basis of the court of appeals' decision, yet TRI's petition neglects to mention it. The court of appeals did *not* hold that the amount in controversy was the amount at stake in the underlying arbitration, but that the amount in controversy was the amount expressly demanded in TRI's *complaint in the district court*:

> The question presented to us thus boils down to whether the $200 million [TRI] sought to recover by its complaint is the amount in controversy under 28 U.S.C. § 1332(a), or whether the amount in controversy must be measured by the zero dollar arbitration award [TRI] sought to vacate. We are satisfied that the amount in controversy is the amount [TRI] sought to recover by its complaint.

App. at 10a. The court of appeals had no reason to decide and did not decide whether the district court would have had jurisdiction if TRI had simply moved to vacate the zero-dollar arbitration award.[2]

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[2] Although TRI has not suggested, either in the court of appeals or in its present petition, that its motion to vacate should be treated as distinct from its complaint, were the Court to see fit to do so the district court would still have had supplemental jurisdiction of the motion to vacate pursuant to 28 U.S.C. § 1367(a), given that the claims asserted by TRI in that motion plainly derive from the same nucleus of operative fact as those asserted in its complaint. *See City of Chicago v. Int'l*

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The actual decision of the court of appeals does not conflict with any of the decisions cited by TRI. The only cited decision involving a federal complaint for damages is *Ford v. Hamilton Investments, Inc.*, 29 F.3d 255 (6th Cir. 1994), and the holding there is fully consistent with the holding here. Hamilton Investments had arbitrated a claim against Ford, a former employee, on which it was awarded $30,524. Like TRI, Ford then filed a complaint against Hamilton in the district court. Unlike TRI, however, Ford sought damages only in the amount of the award, which he alleged to have been entered in disregard of applicable law. The Sixth Circuit held that the Federal Arbitration Act itself confers no jurisdiction and no federal question was otherwise presented. As to diversity jurisdiction, the court of appeals cited *Horton v. Liberty Mutual Ins. Co.*, 367 U.S. 348 (1961), for the proposition that "[t]he general federal rule has long been to decide what the amount in controversy is from the complaint itself. . . . " *Ford*, 29 F.3d at 260, quoting *Horton*, 367 U.S. at 353. Because Ford's complaint sought only $30,524 in damages, less than the jurisdictional threshold, the amount-in-controversy requirement was not satisfied. That logic is fully consistent with the result here. The amount in controversy is the amount sought in the district court complaint. TRI's complaint sought $200 million, well over the jurisdictional threshold, so federal jurisdiction was proper.[3]

College of Surgeons, 522 U.S. 156, 165 (1997); *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725 (1966).

[3] Had TRI's complaint not explicitly sought damages over the jurisdictional limit, then and only then would the third issue in TRI's Petition have been raised. Even on that issue however, there is no circuit conflict. Courts of appeals consistently look to the amount at

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III. CONCLUSION

None of the questions identified by TRI as presented was actually decided by the court of appeals. The questions the court of appeals did decide were decided correctly, based on the unique facts of this case, and the holdings do not conflict with the decision of any other court. Accordingly, TRI's petition for a writ of certiorari should be denied.

Respectfully submitted,

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issue in the underlying disputes, rather than the amount of the arbitral award, to decide whether federal jurisdiction over the award exists. *See, e.g.*, *Bull HN Information Systems, Inc. v. Hutson*, 229 F.3d 321 (1st Cir. 2000); *Sirotzky v. New York Stock Exchange*, 347 F.3d 985 (7th Cir. 2003); *Baltin v. Alaron Trading Corp.*, 128 F.3d 1466 (11th Cir. 1997).